Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

IEZHJA HARTSELL, A Minor,
By Next Friend, JERRY UPTON

Petitioner,

versus

FORT SANDERS REGIONAL
MEDICAL CENTER and
DR. RICHARD O. MANNING

Respondents.

On Petition For Writ Of Certiorari To
The Court Of Appeals Of Tennessee, Eastern Section

PETITION FOR WRIT OF CERTIORARI

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Does the Fourteenth Amendment to the United States Constitution guarantee due process and equal protection of the laws to a 1 lb. 6 oz. baby born in the United States on September 28, 1983 whose doctor believes she is a nonviable fetus?

Did the Court of Appeals of Tennessee, Eastern Section, deny Petitioner Due Process and Equal Protection of the laws by limiting her causes of action to medical malpractice?

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GROUNDS FOR JURISDICTION

Under 28 U.S.C. § 1257 the United States Supreme Court is authorized to review by Writ of Certiorari final Judgments or decrees rendered by the highest court of a State "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution... ." The decision of an intermediate state appellate court has been held to be the highest court of a state for purposes of certiorari to the United States Supreme Court where the highest court denied discretionary review. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968). On August 28, 1995 the Supreme Court of Tennessee filed its Order denying Petitioner's Application for Permission to Appeal the April 21, 1995 Order of the Tennessee Court of Appeals, Eastern Section, which affirmed the Judgment of the Trial Court.

Petitioner here claims that she was denied an opportunity to litigate her common law claim against defendants for battery in violation of due process and was denied the equal protection of the laws by the State Courts' failure to apply a Tennessee Statute designed to protect her. The failure of the Tennessee Courts to allow petitioner's civil remedies under either common or statutory law violated the Fourteenth Amendment to the Constitution of the United States. Fiske v. Kansas, 274 U.S. 380 (1927).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1

"(a) The rights to medical treatment of an infant prematurely born alive in the course of an abortion are the same as the rights of an infant of similar medical status prematurely born spontaneously. Any person who performs or induces an abortion of such an infant shall exercise that degree of professional skill, care, and diligence in accordance with good medical practice necessary to preserve the life and health of such infant prematurely born alive in the course of an abortion, except that if it can be determined, through amniocentesis or medical observation, that the fetus is severely malformed, the use of extraneous life support measures need not be attempted.

(b) Any person who violates this section is guilty of a Class E felony.

(c) No cause of action for wrongful death shall be brought which arises out of the death of a fetus or infant during the course of a lawful abortion, whether such fetus or infant is quick or not,

so long as the abortion is performed in accordance with the provisions of this part; however, once an infant is born alive, any person in attendance thereto shall be civilly responsible for providing all reasonable and necessary care under the circumstances in the general vicinity in which they practice."

Tennessee Code Annotated § 39-4-206 (now § 39-15-206)

STATEMENT OF THE CASE

INTRODUCTION:

This is an application for certiorari by a twelve-year-old petitioner, Iezhja (pronounced "eye'-zhuh") Hartsell, from a denial of an Application for Permission to Appeal to the Supreme Court of Tennessee and an adverse Judgment of the Court of Appeals of Tennessee, Eastern Section. The minor applicant is referred to as "Petitioner," "Plaintiff," "Appellant," "Iezhja," or the "baby." The Defendants/Appellees are Fort Sanders Regional Medical Center, which is referred to throughout as the "Hospital" and Dr. Richard O. Manning, who is referred to either by name or more frequently as the "Doctor."

References to the abridged transcript in the Court of Appeals of Tennessee are made by the designation A.T., volume and page number. References to the technical record are made by the designation R., volume and page number. An Appendix follows containing the Order of the Tennessee Supreme Court, the Order and Opinion of the Tennessee Court of Appeals, Eastern Section, and eight pages of the medical records of Petitioner (Exhibit #2, A.T. I, 11 and Exhibit #12, A.T. I, 100) and is referred to by the designation App. and page number.

FACTS:

On September 28, 1983 at or about 7:24 a.m., Iezhja Hartsell was born at Fort Sanders Regional Medical Center in Knoxville, Tennessee. App. 18a. Prior to her delivery, Dr. Richard Manning, her mother's obstetrician, injected the narcotic

Demerol into her mother's bloodstream. A.T. I, 28. In doing so, he knew it would make it more difficult for the baby to breathe when born. A.T. I, 34; A.T. I, 80; and App. 23a. When the baby was delivered in the labor room, the doctor was in the bathroom. A.T. I, 40. Iezhja was a tiny baby weighing only 1 lb., 5-3/4 oz. App. 18a. Linda Hults and Michael Tinker, a nurse and a nurse anesthetist, took Iezhja to the delivery room and began pumping oxygen to her lungs through a tube in her throat. App. 23a; A.T. III, 311. Upon emerging from the bathroom and discovering what the nurses were doing, the Doctor, without making a physical examination of the child, ordered the removal of her breathing tube, or "extubation." A.T. I, 41; App. 23a.

For nearly an hour, the Defendants waited for Iezhja to die. App. 23a-24a. Iezhja was not taken to the Premature Nursery. App. 23a. She was not given the available drug Neonarcan to counteract the effects of the Demerol she had received via her mother's bloodstream. *See* App. 23a; A.T. I, 192-93. An available neonatologist, a specialist in treating tiny babies, was not called. App. 21a, Admission Comments; A.T. I, 44. No one was asked to give consent on behalf of Iezhja to the abandonment of her care. A.T. I, 44-45. Neither the Doctor, the nurse, the nurse anesthetist, nor any member of the Hospital staff did anything to get much needed oxygen into the newborn baby. A.T. III, 313. While waiting for Iezhja to die, the experienced Nurse Hults instructed a new nurse, Jane Lanham, on the procedure followed at the Hospital for weighing and tagging babies from whom life support had been withdrawn. A.T. III, 311-312. After nearly an hour, when Iezhja had not died as anticipated (A.T. I, 44), she was finally taken to the Premature Nursery (App. 18a). She was gasping for air, and the skin on her chest was retracting between her ribs. *See* App. 18a, 20a; A.T. I, 61-62. Her body temperature was too low to

register on the thermometer. App. 18a. She was crying and her pulse was racing. The 8:30 a.m. Admission Note at the Hospital's Premature Nursery describes Iezhja's condition following the Hospital's procedures: "Rectal Temperature--unable to register on IVAC;"[1] "Apical Pulse--140;" "Respirations--40--gasping;" "Retracting--severe;"[2] "Crying." App. 18a. She was then reintubated to provide her with oxygen and quickly transported to East Tennessee Children's Hospital by Dr. Stephen Prinz. App. 25a-26a.

In addition to the injury, pain and suffering Plaintiff endured for the hour she struggled to breathe without Defendants' assistance, the minor Plaintiff has suffered a loss of hearing and accompanying speech problems due to the destruction from lack of oxygen of the sensitive nerve cells of the inner ear. A.T. II, 136, 141-42; A.T. II, 153; A.T. II, 245. In most other respects, the minor Petitioner is a normal, healthy child. A.T. I, 14-23; A.T. III, 318.

PROCEDURAL HISTORY:

On April 7, 1989, Petitioner filed her Complaint in the Circuit Court of Knox County, Tennessee, against the Hospital and the Doctor and certain nurses in attendance at her birth. R. I, 1.

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[1] Defendants try to pretend that this was the result of an equipment malfunction, but Dr. Prinz records the child's temperature as being 94 degrees upon his arrival at Fort Sanders, raised to 96.9 degrees when he arrived back at East Tennessee Children's Hospital and raised eventually to 98.8 degrees. *See* Problem (5), Hypothermia, App. 28a.

[2] The Doctor explained that severe "retracting" means the baby's skin was sinking into her ribs when her chest expanded. A.T. I, 62, ll. 14-21.

The original Complaint alleged alternate theories of relief for medical malpractice and battery. On January 4, 1991, Plaintiff moved to amend her Complaint to state causes of action based upon the tort of outrageous conduct and upon a violation of Tenn. Code Ann. § 39-4-206. R. I, 73. Upon the motion of Defendants, the trial court dismissed Plaintiff's causes of action for outrageous conduct and violation of Tenn. Code Ann. § 39-4-206. R. II, 156. Subsequently, and *sua sponte*, the trial court offered to and dismissed Plaintiff's cause of action against Defendants alleging battery. A.T. I, 2-3; R. IV, 471-72.

The case came on for trial on March 2, 1993 upon the sole cause of action permitted by the trial court, medical malpractice. A.T. I, 4. The Defendant Doctor testified that the Defendant nurses were acting on his orders in withdrawing life support from the minor Plaintiff, and Plaintiff took a voluntary dismissal as to said nurses. A.T. I, 68. The trial court excluded proof offered by Plaintiff which it viewed as too prejudicial (A.T. I, 98) to the Defendants and further excluded proof Plaintiff offered to establish the standard of care at Defendant Hospital. A.T. II, 225-26. At the close of Plaintiff's proof, the trial court directed a verdict for Defendant Hospital. A.T. III, 319. At the close of Defendant's proof, the trial court refused Plaintiff's request to instruct the jury regarding the physician's duty not to abandon his patients. A.T. III, 366. Thereafter, the jury returned a verdict in favor of the sole remaining Defendant, the Doctor.

CONSTITUTIONAL ISSUES:

The denial of equal protection of the laws was raised first in argument in the trial court in opposition to the pretrial dismissal of plaintiff's statutory cause of action under Tenn. Code Ann. § 39-

4-206. In the Court of Appeals the plaintiff argued that the dismissal in the trial court of plaintiff's statutory cause of action under Tenn. Code Ann. § 39-4-206 in combination with the dismissal of her common law actions resulted in an impermissible extension of the United States Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973). Plaintiff conceded arguendo that the actions of the defendants in removing life support from the minor plaintiff were not malpractice. Nevertheless, appellant maintained that the Court action in limiting her cause of action to malpractice violated her constitutional rights. *See* footnote 2, p. 9 and p. 15 of Appellant's Brief on Appeal. The Opinion of the Court of Appeals of Tennessee, Eastern Section, did not address the Constitutional question (App. 3a-17a), and the Tennessee Supreme Court denied Petitioner's Application for Permission to Appeal (App. 1a).

ARGUMENT

THE COURT OF APPEALS OF TENNESSEE, EASTERN SECTION, ERRED IN DENYING THE PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BY LIMITING HER CAUSES OF ACTION TO MEDICAL MALPRACTICE.

A. A 1 LB. 6 OZ. BABY BORN IN THE UNITED STATES ON SEPTEMBER 28, 1983 IS ENTITLED TO THE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the infamous Dred Scott case, Chief Justice Taney found African-Americans to be "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority." Scott v. Sandford, 60 U.S. (19 How.) 393 at 404-405 (1857). Moreover, the Chief Justice held that they had "no rights which the white man was bound to respect." *Id.* at 407. The Fourteenth Amendment of the United States Constitution was ratified soon after the Dred Scott decision making all persons "born or naturalized in the United States" citizens entitled to "the privileges and immunities of citizens," "due process of law," and "the equal protection of the laws."

In this case the facts before the Court pose directly the question of whether the appellant is a citizen at the moment of her birth or whether her citizenship must first pass a test of "viability" that only her physician can administer. In Planned Parenthood of

Central Missouri v. Danforth, 428 U.S. 52 (1976), Justice Blackmun writing for the majority of the Supreme Court opined:

> "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."

Id. at 64.[3]

The judgment of the attending physician in this case was that the "[p]atient delivered a non viable fetus in labor room bed . . . ." App. 22a. Consistent with the Supreme Court's decision in Danforth, the Court of Appeals of Tennessee in this action has made doctors the sole arbiters of plaintiff's rights by limiting her causes of actions to that one arising under the Tennessee Medical Malpractice Review Board and Claims Act of 1975. Tenn. Code Ann. § 29-26-115(b).

If the testimony of expert doctors on the "standard of care," nowever, is the exclusive "law" applicable to life and death decisions for severely premature newborns, then the Fourteenth Amendment to the United States Constitution formulated to protect all citizens' right to life has lost its meaning. Defendants' expert at trial repeatedly testified that the standard of care for the minor Plaintiff in this case was to do nothing. He stated, "[W]e'll not do anything." A.T. III, 344, l. 4. "[O]ur process would be not to do anything." A.T. III, 346, l. 7. "[N]o efforts will be made for this baby." A.T. III, 347, l. 3. Moreover the expert explained the

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[3]The Court found Section 6(1) of the Missouri Act unconstitutional because "[i]t does not specify that such care need be taken only after the state of viability has been reached." *Id.* at 83.

reason for the Do Nothing standard of care was that "these babies were considered nonviable for all practical purposes." A.T. III, 344, ll. 6-7.[4]

Petitioner here contends that the 1976 Supreme Court ruling in Planned Parenthood v. Danforth, striking down Section 6(1) of the Missouri Act, was an unconstitutional extension of the 1973 decision in Roe v. Wade. Moreover, Petitioner contends that the Tennessee Courts have denied her Fourteenth Amendment rights by falling prey to the same fallacy as did the Supreme Court in Danforth, to wit, making doctors the sole arbiters of severely premature infants' rights when those citizens in the judgment of their physicians are "nonviable." Put simply, how can the law of the land protect viable, unborn babies and yet the courts fail to protect viable, live born babies whether or not their doctors consider them "nonviable for all practical purposes?"[5]

The majority of this Court has now rejected "viability" as the touchstone for constitutional rights. Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Yet as recently as 1992, Justice Blackmun reminds us:

> No member of this Court--nor for that matter, the Solicitor General, . . . has ever questioned our holding in Roe that an abortion is not 'the termination of life entitled to Fourteenth

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[4] Later in the expert's testimony it becomes apparent that one of the practicalities to which he is referring is "the immense cost society has to pay when the outcome is not good . . . ." *See* A.T. III, 362, ll.6-7.

[5]The language chosen by Defendants' expert mirrors the quality of life analysis of Roe, assessing "meaningful life outside the mother's womb." Roe v. Wade, *supra*.

> Amendment protection.' Accordingly, a State's interest in protecting fetal life is not grounded in the Constitution.

Planned Parenthood of Southeastern Pennsylvania v. Casey 112 S.Ct. 2791, 120 L.Ed.2d 674 at 751 (1992) (citations omitted).

The question, however, is not simply when fetal life becomes a "person born" within the meaning of the Fourteenth Amendment but more importantly who is empowered to determine when life is constitutionally entitled to protection.

It is unconstitutional for either the Tennessee Courts or indeed the United States Supreme Court to delegate to members of the medical profession the determination of which citizens are entitled to the Fourteenth Amendment protection. It is the duty of the state, by general laws, to protect and provide for those who are incapable of taking care of themselves. Jones' Heirs v. Perry, 18 Tenn. 59 (1836). Ordinarily, it is the judicial role to protect the rights of individual infants where a legislative act has been used to take those rights away. In this action, however, just as in the Dred Scott case, it is the Courts themselves which have taken away the rights of the individuals. Scott v. Sanford, *supra*. Only this Court can restore the Constitutional rights which have been taken away. As foretold in Jones' Heirs, the Court must protect the rights of an individual infant lost to the application of a law because the time may come "when the sanctuary of justice will be the last hope of the oppressed." *Supra*.

B. THE STATE OF TENNESSEE THROUGH ITS COURTS HAS DEPRIVED IEZJHA HARTSELL OF DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

Iezhja Hartsell, a citizen of the United States, has suffered discrimination at the hands of the judiciary of the State of Tennessee. She has lost her right to civil remedies guaranteed to every other citizen. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 at 148 (1907). The Tennessee Supreme Court has refused to hear Appellant's case, and the Court of Appeals of Tennessee, Eastern Section, has withheld her right to seek civil redress for common law and statutory violations by judicial sleight of hand.

In its opinion, the Court of Appeals of Tennessee disposed of Plaintiff's common law right to sue for battery stating:

> Since the Defendants were authorized to administer medical care, the extubation **was consensual**. We therefore find the Trial Court correctly concluded that the Plaintiff's cause of action was for medical malpractice, not battery.

App. 7a-8a.

Yet when it comes to the consideration of plaintiff's civil action under the Tennessee abortion statute,[6] the Court finds it to be inapplicable saying that "[t]he plaintiff does not contend that she was born as a result of a failed abortion." App. 9a. In fairness to the plaintiff, either the efforts to terminate her life were with her mother's consent or they were not. If she was being aborted she was entitled to the protection afforded her by the Tenn. Code Ann. § 39-4-206. If not, then the harmful touching of her was a nonconsensual common law battery for which cause, due process would allow a trial.

DUE PROCESS:

The Fourteenth Amendment to the United States Constitution guarantees every litigant in our judicial system certain minimum process of law. Daniel Webster in his argument in the Dartmouth College case described this "due process of law" as "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Dartmouth College v. Woodward, 17 U.S. 518 at 581 (1819). There was no legal reason to deny plaintiff her common law action for battery in this cause as the Tennessee Courts have never found the theories of malpractice and battery to be inconsistent.

As explained in Cardwell v. Bechtol (724 S.W.2d 739, at 751 (Tenn. 1987)), "these theories, battery and malpractice, are not ordinarily inconsistent. . . ." "The one is based on lack of care or skill in the performance of services contracted for, and the other

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[6]The relevant portions of the Tennessee Statute are similar but not identical to Section 6(1) of the Missouri Statute in Danforth.

one wrongful trespass on the person regardless of the skill or care employed." Lanford v. York, 457 S.W.2d 525 at 528 (Tenn. 1970) (quoting Cady v. Fraser, 122 Colo. 252, 222 P.2d 422 at 424 (1950).

In Lanford v. York, *id.*, as in this case, Plaintiff brought two causes of action: one for malpractice and another for assault and battery. The trial court required an election by Plaintiff between the two. Plaintiff elected to try the malpractice action, and the jury returned a verdict for Defendant. Nevertheless, the Tennessee Supreme Court remanded that case for trial on the single issue of assault and battery. *Id.* at 529.

The extubation of Iezhja Hartsell was clearly a harmful, offensive and nonconsensual touching. "Without consent, the treatment constitutes a battery." Cardwell v. Bechtol, *supra* at 751.

> Thus, it will be seen that whenever a physician performs surgery upon a person, not being authorized by consent and not being protected by the exception made in cases of emergency, the physician is liable to such person for consequent injuries, regardless of whether such injuries resulted from negligence or otherwise.

Ray v. Scheibert, 484 S.W.2d 63, 71 (Tenn.App. 1972), *cert. denied.*

Instead of the Courts allowing a remedy for common law battery, the Tennessee Court of Appeals found that the mother had consented to the maltreatment of her baby and thus no action for battery could arise. Such a finding, however, runs contrary to the recent decisions of this Court disallowing the so-called "substituted judgment" theory. In Cruzan v. Missouri Department of Health,

497 U.S. 261 at 286 (1990), the Court concluded: "[W]e do not think that the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself." *Id.* at 286. Petitioner argues that the failure to provide her with necessary care to preserve her life removes any implied consent to touch her, ab initio. She herself seeks civil redress for battery but has not been heard in the Courts of her State in violation of her right to Due Process.

EQUAL PROTECTION:

In addition to the Court of Appeals denying plaintiff due process, it denied her the equal protection of the laws by refusing to carry out the intent of a Tennessee Statute specifically designed to protect her in the face of "consensual" acts aimed at her demise. In 1978 the Tennessee Legislature, in the wake of the Supreme Court's decision in Roe v. Wade, *supra*, exercised its authority to regulate the practice of medicine governing infants born alive in the course of an abortion. Tenn. Code Ann. § 39-4-206 sets out statutory minimum rights for infants prematurely born alive requiring physicians and other health care providers to "exercise . . . good medical practice necessary *to preserve* the life and health of such infant . . . (emphasis added)." The Act makes "any person in attendance . . . civilly responsible for providing all reasonable and necessary care . . . ." Tenn. Code Ann. § 39-4-206(c). While the Act does not specify what care is required "to preserve the life," it is transparent that the law requires more than the Do Nothing standard of care enunciated by Defendants' expert. Moreover, the Act itself sets out that it intends that the rights for unwanted newborns "shall be the same as the rights of an infant of

similar medical status prematurely born spontaneously." Tenn. Code Ann. § 39-4-206(a).

The Court of Appeals of Tennessee found the statute inapplicable noting that "Plaintiff does not contend that she was born as the result of a failed abortion." App. 9a. Yet, it is the Court and not Plaintiff that found that the Doctor's actions were "consensual." Moreover, Defendants' expert justifies the Defendants' actions by addressing Plaintiff's birth in terms of an abortion. Dr. Manning notes in Iezhja's Baby Chart in the Delivery Comments: "Patient delivered nonviable fetus." App. 22a. Defendants expert states that the minor Plaintiff is "nonviable for all practical purposes." A.T. III, 344, ll. 6-7. Even more persuasively, Defendants' expert says Plaintiff's birth was not "a process of delivery." A.T. III, 347, l. 22. The 6th Edition of Black's Law Dictionary defines "abortion" to include both the spontaneous and artificially induced expulsion of an embryo but explains that in a legal context, the term usually refers to an induced abortion. Given the finding of the Court of Appeals that the Defendants were acting with plaintiff's mother's consent, and Defendants' position that Plaintiff's birth was something short of a delivery, the application of this statute to protect her was both appropriate and required.

In passing Tenn. Code Ann. § 39-4-206, the Tennessee Legislature clearly stated that there was but one class of infant rights to medical care, yet the Legislature recognized two types of birthing processes: one attended by a physician retained to terminate the life and the other to preserve it. The ruling of the Court of Appeals of Tennessee stands the statute on end by impermissibly establishing two classes of infant rights to medical care: ones which can be enforced by civil action under the Tennessee abortion statute and the common law of battery and ones

which cannot. In violation of the Equal Protection Clause of the Fourteenth Amendment, the Court of Appeals of Tennessee has discriminated against Iezhja Hartsell by placing her in a class of infants who are not entitled to either the statutory or common law protection. The result achieved is identical to that which the United States Supreme Court achieved in overruling Section 6(1) of the Missouri statute in Danforth whereby only the physician can determine which class of infants is entitled to protection.

C. JUDICIAL ACTIONS WHICH ENABLE INVIDIOUS DISCRIMINATION BY PRIVATE CITIZENS ARE PROHIBITED BY THE UNITED STATES CONSTITUTION.

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Shelley v. Kraemer, 334 U.S. 1 at 13 (1948).

Nevertheless, when the States have made available to such private citizens the full coercive power of government to deny individuals their rights, then judicial action becomes state action offensive to the Fourteenth Amendment. *Id.* at 19. Petitioner contends that the Court of Appeals of Tennessee has impermissibly delegated the full judicial power of government to determine who is entitled to

Fourteenth Amendment protection to individual doctors who may or may not recognize the rights of newly born citizens.

In the instant action, the private conduct of which Petitioner complains is not an isolated occurrence. Indeed, Plaintiff proved that no procedure was in place to make sure consent would be obtained before withdrawing life support from a minor child who was unable to consent to such action. A.T. III, 286, ll. 9-18; A.T. III, 314. This was true in spite of the fact that the Hospital had been previously faced with similar decisions (A.T. III, 313, ll. 14-21); that the clinical coordinator knew life support was being withdrawn from babies without consent (A.T. III, p. 316, l. 20 - p. 317, l. 20).

The relevant procedure which Defendant Hospital had in place involved weighing and tagging babies while they were waiting for them to die. Fortuitously, the Hospital's procedure was uncovered because one nurse (Hults) happened to be teaching another nurse (Lanham) at the time of Iezhja's birth.

> Q. And [Dr. Manning] ordered you to stop [giving oxygen to Iezhja] and you did?
>
> A. He ordered us to stop and we did. Uh-huh.
>
> Q. And after you did, you got another nurse, a nurse Jane Lannum (phonetically), to come into the nursery with you, did you not?
>
> A. Yes, I did.

Q. And tell the jury what your relationship or what the relative position of you and Nurse Lannum was.

A. Jane Lannum was a new employee of the hospital, hired to work in labor and delivery. She had been up there approximately just a few weeks. And I was an RN that had worked there for some time, and I was her preceptor. She was to work with me and I was to show her and teach her about what we do in labor and delivery.

Q. And on this particular day you were showing her and teaching her what was done after a baby who was alive -- the decision was made by a physician no longer to provide them with oxygen; is that not true?

A. That's true.

Q. And the procedure that was done was to follow a procedure of taking the footprints of the baby and placing tags on the baby and generally weighing the baby, but not taking the baby to the nursery?

A. That is correct.

A.T. III, p. 311, l. 13 - p. 312, l. 17.

The intended result of defendants' procedure, and the nearly accomplished result in this case, is that the baby dies. Just as in analyzing the restrictive property covenants in Shelley v. Kraemer (*supra*), the mere fact that a procedure has been set up by private citizens to deprive individuals of their rights, standing alone, cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. In this case as in Shelley *(supra)*, however, the Courts have made available to the private citizens the power with which they may deny individuals their right to life. The rule enunciated in Planned Parenthood v. Danforth, *supra*, is that only the attending physician can judge when viability begins. The decision of the Court of Appeals of Tennessee is that only physicians and their standard of care can determine the right to receive or withdraw life saving care. Under those rulings, the existence of Defendants' standard procedure for terminating life absolves them of liability for wrongdoing and denies Petitioner both her right to life and to equal protection of the laws.

The fundamental right to life found in the Fifth and Fourteenth Amendments to the United States Constitution is entitled to protection by this Court when judicial actions are being employed to justify private discrimination of that right.[7] As long as Courts delegate the responsibility of protecting life to Doctors

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[7] This Court has held in other cases that judicial actions which unfairly restrict fundamental freedoms constitute "state action" under the Fourteenth Amendment. See NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (Association); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Speech); Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir. 1980) (right to counsel).

based upon their judgments about "meaningful life" and "viability for all practical purposes," then a whole class of citizens shall suffer the procedure meted out to Iezhja Hartsell in this case.

D. THE JUDICIAL ACTIONS DENYING APPELLANT DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS SHOULD BE OVERRULED AND PETITIONER RESTORED TO THE RIGHTS OF OTHER CITIZENS.

For the Court to act in this case would place all doctors and hospitals on notice that the first breath of life entitles the newly born citizen to "due process and equal protection of the laws."[8] To answer the question which this Court has posed in Simon v. Eastern Kentucky Welfare Rights Organization 426 U.S. 26 (1976) at 46, the removal of the limitations on liability regardless of the physician's judgment about the newborn's viability would force Doctors and Hospitals to act with more humanity, not more technology. Had Iezhja Hartsell been held and warmed, she would have no cause for battery, but to touch her offensively is anathema. This Court might realistically expect the Hospitals of this country to take immediate action to enact procedures which treat our newest citizens humanely without regard to their race, their mothers' preferences for their survival, and especially without regard to their doctor's unilateral judgments about the "meaningfulness" of their lives.

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[8]The Court may soon confront similar questions in evaluating proposed congressional action outlawing "partial birth" abortions. H.R. 1833, 104th Cong., 1st Session (1995).

Justice O'Connor's Opinion in Planned Parenthood v. Casey begins with the words: "Liberty finds no refuge in a jurisprudence of doubt." *Supra*, L.Ed.2d at 693. In response, Iezjha Hartsell says the doctors have left me freezing, gasping for air and waiting on a table to die. When I lived in spite of them, the Courts left me to be judged by the same doctors who abandoned me and have denied me those rights afforded other citizens under the law. Justice Scalia ends his Opinion in Casey stating: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Id.* L.Ed.2d at 797. In response, Iezjha Hartsell states that it would work a grave injustice to her and others similarly situated if this Court leaves this area of the law without guaranteeing Fourteenth Amendment protection for each citizen born alive, no matter how small or insignificant their life may seem.

RESPECTFULLY SUBMITTED this 26th day of November, 1995.

DUNGAN & MEARES

By: _____

MICHAEL H. MEARES
Counsel of Record for Plaintiff
Post Office Box 5023
Maryville, TN 37802-5023
(423) 977-0632

APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

IEZHJA HARTSELL, b/n/f	)	FILED
	)	95 AUG 28 AM 10:07
Plaintiff-Appellant,	)	Appellate Court Clerk
	)	Knoxville
	)	
v.	)	Knox Circuit
	)	C.C.A. NO.
	)	03A01-9407-CV-00234
FORT SANDERS	)	
REGIONAL MEDICAL,	)	
ET AL.,	)	
	)	
Defendants-Appellees.	)	

ORDER

The Court has considered the application for permission to appeal filed by the appellant and the entire record in the above case, and it is the opinion of the Court that the application should be denied.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

IEZHJA HARTSELL, b/n/f JERRY UPTON	)	Knox County 03A01-9407-CV-00234
Plaintiff-Appellant	)	
v.	)	Hon Dale C. Workman Judge
FORT SANDERS REGIONAL MEDICAL and DR. RICHARD O. MANNING	)	FILED 95 APR 21 AM 10:29 Appellate Court Clerk Knoxville
Defendants-Appellees	)	

ORDER

This cause was regularly heard and considered by the Court. IT IS NOW ORDERED that the judgement of the Trial Court is affirmed. Costs of appeal are adjudged against the Plaintiff and her surety, for which execution may issue if necessary.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

IEZHJA HARTSELL, b/n/f	)	Filed
	)	95 APR 21 AM 10:29
Plaintiff-Appellant,	)	Appellate Court Clerk
	)	Knoxville
	)	
v.	)	Knox County
	)	03A01-9407-CV-00234
FORT SANDERS	)	
REGIONAL MEDICAL,	)	Hon. Dale C. Workman
ET AL.,	)	Judge
	)	
Defendants-Appellees.	)	Affirmed and Remanded

MICHAEL H. MEARES OF MARYVILLE FOR APPELLANT

RICK L. POWERS and JEFFREY L. INGRAM OF KNOXVILLE FOR APPELLEE FORT SANDERS REGIONAL MEDICAL CENTER

R. FRANKLIN NORTON and GARY G. SPANGLER OF KNOXVILLE FOR APPELLEE RICHARD O. MANNING, M.D.

OPINION

Goddard, P.J. (E.S.)

This action arises from a complaint filed April 7, 1989, by the Plaintiff, Iezhja Hartsell, a minor, by next friend, Jerry Upton, against Fort Sanders Regional Medical Center, Dr. Richard O. Manning and certain nurses in attendance at the Plaintiff's birth.

The Plaintiff was born on Sept. 28, 1983, at Fort Sanders. Dr. Manning was the mother's obstetrician. The complaint, as amended, alleged alternate theories of relief for medical malpractice, battery, outrageous conduct, and a violation of T.C.A. 39-4-206 [now 39-15-206] (rights to medical treatment of infant prematurely born during abortion). The Circuit Court for Knox County dismissed the Plaintiff's causes of action for outrageous conduct and violation of T.C.A. 39-15-206. The Court later dismissed the Plaintiff's cause of action for battery. The issue of medical malpractice was subsequently tried on March 2, 1993. The Plaintiff took a voluntary non-suit as to the nurses on March 3, 1993. At the close of the Plaintiff's proof, the Trial Court directed a verdict for Fort Sanders. The jury returned a verdict for Dr. Manning. This appeal followed.

The Plaintiff alleges that the Trial Court improperly limited her causes of action to medical malpractice, that it improperly excluded as unduly prejudicial certain proof that was offered, and excluded proof as to the Hospital's standard of care. Further, the Plaintiff claims that the Judge erred by failing to instruct the jury on a physician's duty not to abandon his patients. Specifically, the Plaintiff submits the following issues on appeal:

> I. Did the trial court err in limiting the Plaintiff's causes of action to medical malpractice?
>
> A. Did the trial court err in sua sponte dismissing the Plaintiff's Complaint for Battery when she was harmfully and offensively touched without her consent, either express of implied in law or fact?
>
> B. Did the trial court err in dismissing Plaintiff's Complaint for civil remedies under

Tenn. Code Ann. § 39-4-206 (now 39-15-206), when the Tennessee Legislature had mandated a statutory minimum standard of care for live born infants?

C. Did the trial court err in dismissing Plaintiff's Complaint for Outrageous Conduct when Defendant left the newborn Plaintiff to die in a hospital apart from her mother, unsupported and gasping for breath from approximately 7:35 a.m. until 8:20 a.m.?

II. Even if the trial court did not err in limiting Plaintiff's causes of action to medical malpractice, did it err in its instructions to the jury and evidentiary rulings on medical malpractice?

A. Did the trial court err in failing to instruct the jury on a physician's duty not to abandon his patients?

B. Did the court err in excluding evidence that the Defendants did nothing for the newborn Plaintiff until she "did not stop gasping at the end of five minutes" and further that Defendants stopped their resuscitation efforts when she "had a heart rate in excess of 100?"

C. Did the trial court err in prohibiting any impeachment of Defendant's witnesses with the Hospital's claim of having kept a 2 lb, 14 oz premature baby alive in 1924?

D. Did the trial court err in excluding proof of the Standard of Care as enunciated by

Judicial Council of the American Medical Association when Defendant Doctor had admitted the accuracy of the A.M.A.'s ethical rulings and had contractually agreed to abide by them?

III. Did the trial court err in directing a verdict in favor of Defendant Hospital when there was material evidence in the record which would support a verdict for the Plaintiff?

Iezhja Hartsell was born prematurely September 28, 1983, weighing only 1 pound, 5-3/4 ounces at birth. Her mother was an admitted cocaine and marijuana user and, as such, a high-risk patient. Dr. Manning was not in the delivery room at the time of the delivery. The nurses who delivered the baby began pumping oxygen to her lungs through a tube in her throat. When Dr. Manning learned this he ordered the removal of her breathing tube (called "extubation"), saying the infant was too premature to be viable. Almost one hour later, the baby was still breathing. The baby's mother had received Demerol shortly before giving birth, which made it more difficult for the baby to breathe on her own after birth. However, no drugs were given to the baby to counteract the effect, and no efforts were made to assist the baby in breathing. After the baby had been extubated, she was weighed and tagged in preparation for her death. Approximately one hour after her birth, the baby was still breathing, and was transported to the Premature Nursery at Fort Sanders. A neonatologist from nearby East Tennessee Children's Hospital was called in. The baby survived, with only a loss of hearing and accompanying speech problem, allegedly due to lack of oxygen during the first hour of her life. The Plaintiff is in most other respects a normal, healthy child today.

The three sets of issues raised by the Plaintiff will be dealt with in the order presented. The first deals with the Trial Court's limiting the Plaintiff's cause of action to medical malpractice.

The Plaintiff first contends that the Trial Court erred in dismissing the Plaintiff's cause of action for battery.[1] The Plaintiff contends that the act of administering Demerol to the mother and consequently to the Plaintiff via her mother's bloodstream, and the extubation, were two distinctive acts of tortious conduct constituting battery.

The first act, administering Demerol to the mother, clearly is not battery, since the mother had consented via contract with Dr. Manning for medical care, including the administration of proper drugs. The Plaintiff concedes that since this action was consensual, the only proper cause of action would lie in medical malpractice.

The issue of whether the extubation constitutes a battery depends on whether there was consent. If we find that the extubation constitutes a battery, it does not necessarily mean that there is no action for malpractice. Our Supreme Court has said that when battery exists, malpractice is not necessarily reached, but if no battery can be shown, the issue becomes one of malpractice. Cardwell v. Bechtol, 724 S.W.2d 739 (Tenn. 1987). Clearly, the Plaintiff was not able to give consent, but the Defendants maintain that the Plaintiff's mother gave consent. The mother, Leiza Hartsell, executed a special permit form when she was admitted to the Hospital the day the Plaintiff was born. The Trial Court noted

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[1] The Plaintiff claims that the Trial Court dismissed this action sua sponte. However, the record indicates that the claim was dismissed pursuant to a motion for partial summary judgment by the Defendants.

that Dr. Manning had the consent to treat not only the mother, but also the baby. Since the Defendants were authorized to administer medical care, the extubation was consensual. We therefore find that the Trial Court correctly concluded that the Plaintiff's cause of action was for medical malpractice, not for battery.

We next turn to the issue of whether the Trial Court correctly dismissed the Plaintiff's complaint for civil remedies under T.C.A. 39-4-206 (now 39-15-206). That Section is titled "Rights to medical treatment of infant prematurely born alive during abortion." The Plaintiff claims that the language of the Statute requires medical personnel in attendance of a prematurely born infant to render aid. The Section reads in pertinent part as follows:

> (c) No cause of action for wrongful death shall be brought which arises out of the death of a fetus or infant born during the course of a lawful abortion, whether such fetus or infant is quick or not, so long as the abortion is performed in accordance with the provisions of this part; however, once an infant is born alive, any person in attendance thereto shall be civilly responsible for providing all reasonable and necessary care reasonable under the circumstances in the general vicinity in which they practice.

Abortion is defined by T.C.A. 39-15-201, as follows:

> (1) "Abortion" means the administration to any woman pregnant with child, whether such child be quick or not, of any medicine, drug or substance whatever, or the use or employment of any instrument, or other means whatever, with the

intent to destroy such child, thereby destroying such child before its birth.

The Plaintiff does not contend that she was born as a result of a failed abortion. Therefore, to find this Section applicable, we would have to hold that it applies to all infants born prematurely, not just to those born in the course of an abortion. The Plaintiff cites no cases, nor can we find any interpreting this Statute to apply to infants born prematurely other than during the abortion.

To extend the natural reach of this Statute would require us to ignore its plain language. This Section provides that a fetus born alive during an abortion is to be treated as a live birth, and to be accorded the same level of care afforded to all other premature births. The clear language of the Statute shows that it was designed to protect babies born during an abortion, not all babies born prematurely. This is not to say that premature babies are not to be protected. But this Section does not give babies born prematurely a special cause of action beyond that which they are already assured under the law of medical malpractice. We find that the Trial Judge was correct in dismissing the Plaintiff's cause of action for civil remedies under T.C.A. 39-4-206.

The next issue presented is whether the Trial Court erred in dismissing the Plaintiff's complaint for outrageous conduct in leaving the Defendant to die. The Plaintiff maintains that it was outrageous conduct to take her away from her mother, away from the nursery, and leave her to die while a nurse instructed a co-worker on the procedure for preparing her for death. It is important to note that the Plaintiff is complaining of conduct bestowed upon her, not on the effect of the conduct on her mother. Tennessee courts recognize the tort of outrageous conduct. Medlin v. Allied Investment Co., 217 Tenn. 469, 398 S.W.2d 270 (1966).

See also: Johnson v. Woman's Hospital, 527 S.W.2d 133 (Tenn. App. 1975). According to Medlin, before an action for outrageous conduct can be sustained: "(a) the conduct complained of must have been outrageous, not tolerated in civilized society, and (b) as a result of the outrageous conduct, there must be serious mental injury."

We hold the Trial Court was correct in dismissing the Plaintiff's complaint for outrageous conduct. The Plaintiff failed to allege any mental injury that occurred as a result of the Defendants' actions. In fact, the Plaintiff conceded in her brief that she has "no conscious memory of the ordeal." Instead, the Plaintiff summarily concludes that "[s]een through the minor Plaintiff's eyes, the Defendants' taking her away from her mother, not taking her to the nursery for an hour and instead preparing for her to die while her medical care was abandoned caused both severe physical and emotional distress." This is not enough to make out a claim for outrageous conduct. To find that such conduct was enough to cause the Plaintiff mental distress would mean that she was cognizant of her surroundings. It is highly unlikely that an infant, less than one hour old, would know that she was being taken away from her mother. It is far less likely that she would know that she was being taken away from her mother. It is far less likely that she would know what a nursery was, or that she should be in one, or that she was being prepared for her death. The Plaintiff cites the Restatement of Torts as saying that the tort of outrageous conduct is still developing. While this may be true, the law is sufficiently developed to require some kind of mental injury, which is lacking in this case. What might be outrageous conduct to a cognizant adult is not necessarily outrageous conduct to a barely living infant, with no memory of the conduct, nor any signs of mental injury resulting therefrom.

Having concluded that the Trial Court was correct in limiting the Plaintiff's cause of action to medical malpractice, we must now turn to the second set of issues the Plaintiff raises.

The Plaintiff first claims that it was error not to instruct the jury on a physician's duty not to abandon his patient. The Plaintiff offered Tennessee Pattern Jury Instructions §6.08 (now §6.16), which states:

> Once the physician-patient relationship has been established and the physician has undertaken to treat a patient, the physician is under a duty [not to abandon his patient and] to continue treating the patient unless and until the patient orders the physician off the case, the patient's condition improves so that the physician gives [due] notice of his intent to quit the case and provides an opportunity for the patient to obtain another physician's services.

The Defendant Dr. Manning claims that there was no error in the Trial Court's not giving the requested instruction because the allegation was not supported by the proof. He maintains that no abandonment occurred, because even though the baby's life support was withdrawn, monitoring of her continued, while Dr. Manning attended to his other patient, the mother.

We believe that the Plaintiff misunderstands the concept of abandonment as it applies to a physician-patient relationship. The Plaintiff maintains that the cessation of medical treatment alone constitutes abandonment. That, however, is not the case. The Pattern Instruction that the Plaintiff submitted is based upon the case of Burnett v. Layman, 133 Tenn. 323, 181 S.W. 157 (1915). Burnett is a classic illustration of abandonment. In that case, the

physician, after becoming alarmed that he had ruptured his patient's urethra, told the patient to find a surgeon and then quickly departed, making no attempt to help or otherwise relieve the patient's pain. The physician in that case obviously believed that further medical care was needed, but refused to administer it, and left the patient. As shown by Burnett and cases from other jurisdictions, abandonment requires a complete termination of the physician-patient relationship. See, e.g., Lee v. Dewbre, 362 S.W.2d 900 (Tex.Civ.App.1962). ("Abandonment, when used in cases dealing with the physician-patient relationship, generally means the unilateral severance of the professional relationship between himself and the patient without reasonable notice at a time when there is still the necessity of continuing medical attention.")

In this case, the Defendant could not have abandoned the patient, because the relationship was never severed. After determining, in his medical judgment, that no further treatment was warranted, Dr. Manning ordered the extubation. However, the Plaintiff was continually monitored by the nurses, and Dr. Manning ordered a neonatologist to examine the infant. Had the Plaintiff truly been abandoned, neither the monitoring nor the consultation of a specialist would have occurred.

Having concluded that no abandonment took place, it is obvious that the Trial Judge was correct in his decision not to charge the Plaintiff proposed instruction regarding a physician's duty not to abandon his patient. A court is not required to instruct the jury on an allegation that is not supported by the proof. Guy v. Vieth, 754 S.W.2d 601 (Tenn.1988).

We next consider whether the Trial Court erred in excluding statements contained in a medical record from Dr. Stephen C. Prinz. The Trial Court excluded the statements on the

ground that they were unreliable and that any probative value of the statements was outweighed by the danger of unfair prejudice, pursuant to Tennessee Rules of Evidence 403.[2]

The information the Plaintiff seeks to have reviewed is not part of the record before this Court. It is attached to the Plaintiff's brief as an appendix. Because it is not part of the record, we cannot review it. Consequently, we are not in a position to determine whether the evidence was properly excluded, and must affirm the Trial Court's decision.

The next issue is whether the Trial Court properly excluded evidence that Fort Sanders had kept alive a premature baby in the 1920s. Fort Sanders was granted a motion in limine to exclude the introduction of a television commercial the Hospital aired in 1988 regarding the Hospital keeping a 2-pound, 14-ounce premature baby alive in 1924.

Fort Sanders argues that the issue was waived by the Plaintiff in that she failed to raise it in her motion for a new trial. We agree. The Rule regarding such waiver is clear:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for

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[2] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> new trial; otherwise such issues will be treated as waived.

Tennessee Rules of Appellate Procedure 3(e).

The Plaintiff did not raise the issue of the excluded evidence in her motion for a new trial. That failure constitutes a waiver of the issue on appeal. See Mason v. Tennessee Farmers Mut. Ins. Co., 640 S.W.2d 561 (Tenn.App.1982).

We next turn to the issue which complains of the Trial Court's excluding proof of American Medical Association rulings when Dr. Manning had contractually agreed to abide by those rulings. Again, we find that this alleged error has been waived.

The Plaintiff's Attorney attempted to introduce the evidence of the AMA rulings twice during trial. The first time, counsel tried to read into evidence a request for admission regarding the AMA rulings. That attempt was objected to on the grounds of hearsay. Counsel for the Plaintiff again tried to enter the opinions during the testimony of a witness. Both attempts were made on the first day of trial, and no offer of proof was made for either on that day. Counsel for the Plaintiff did try and offer the first attempt into proof at the close of all proof, but that was denied by the Trial Court, because it was not made the day the evidence was excluded. It is arguable that it was within the discretion of the Trial Court whether to allow the proof at that time. But assuming that it was not within the court's discretion, we do not think that it was anything more than harmless error to refuse to allow the testimony. As the Plaintiff concedes, ethical opinions are not the standard of care in Tennessee. The standard of care in a medical malpractice action is determined by competent expert medical testimony, according to T.C.A. 29-26-115. See also: Payne v. Caldwell, 796 S.W.2d 142, 143 (Tenn.1990):

> We see no ambiguity or lack of clarity in the dictates of T.C.A. 29-26-115. It provides unequivocally that each of the three basic elements of a medical malpractice action--the standard of care, the breach of the standard, and proximate cause--be proven by testimony of experts who were licensed and practicing in Tennessee or a contiguous bordering state during the year preceding the date that the alleged injury or wrongful act occurred.

Thus, the AMA opinion does not establish the standard of care, and its exclusion was not error.

The final issue that the Plaintiff presents is whether the Trial Court erred in directing a verdict for Fort Sanders Hospital. The Plaintiff maintains that she established the Hospital's standard of care, that said standard of care required consent of the patient to withdraw life support, and that no consent was obtained. Fort Sanders maintains that the Plaintiff offered no proof regarding a Hospital's standard of care, and because no prima facie case was established as to it, a directed verdict was proper. Once again, we must find the issue without merit.

Because we have held that the Trial Court properly limited the Plaintiff's cause of action to medical malpractice, the issue of whether a directed verdict was proper turns on whether the Plaintiff presented material evidence to support that theory.

To find that the Plaintiff presented evidence that she established the Hospital's standard of care would require us to read more into the record than is there.

The Plaintiff claims that she established Fort Sanders' standard of care by the testimony of Larry B. Snodgrass, who at the time of the Plaintiff's birth was the associate risk manager at the Hospital. The Plaintiff's attorney asked Mr. Snodgrass about a 1983 accreditation manual for hospitals. Fort Sanders was accredited in 1983. The Plaintiff claims that the following testimony of Mr. Snodgrass, referring to the accreditation manual, establishes a standard of care requiring the Hospital to obtain informed consent before treating a patient:

> Q: The patient should not be subjected to any procedure without his voluntary, competent, and understanding consent or that of his legally authorized representative.
>
> A. Yes. I would say that would be reasonable.
>
> Q. And applicable to Fort Sanders Hospital back on that date [when the Plaintiff was born]?
>
> A. Yes.

The Plaintiff then argues that there was no procedure in place to guarantee that consent would be obtained for withdrawing life support from a minor child who was unable to give consent. Mr. Snodgrass also testified, however, that the Hospital did not have a responsibility for obtaining informed consent:

> Q. Well, what you agreed with me with, I believe, was that the corporation, the hospital, had some responsibility with regard to making sure that the patients within the hospital -- consent was obtained before medically significant procedures were performed upon them, correct?

A. The hospital does not have the responsibility for informed consent. The hospital does take consent forms.

Mr. Snodgrass further testified that the decision to withdraw life support was to be made by the doctor and patient, or the patient's surrogate. Thus, Mr. Snodgrass' testimony did not establish a standard of care applicable to Fort Sanders that would require it to insure informed consent was obtained from the minor regarding the extubation. Consequently, the Plaintiff did not prove that Fort Sanders had an applicable standard of care for this situation, and was therefore unable to prove a breach of that standard. The directed verdict was appropriate as to Fort Sanders.

For the reasons stated above, the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Plaintiff and her surety.

S/ Houston M. Goddard, P.J.(E.S.)

CONCUR:

S/ Herschel P. Franks, J.

S/ Don T. McMurray, J.

FORT SANDERS PRESBYTERIAN HOSPITAL
NURSE'S ADMISSION ASSESSMENT AND NOTES

LABEL Girl Hartsell Cord blood sent to lab
Yes ____ No ____
Time of Birth 9/28/83 @ 7:24 a.m. Admitted to Premature Nsy
Time of Admission 8:30 a.m. Radiant Warmer Module X
Birth Weight 1#-5 3/4 oz Oxygen Conc. (by hood) ___%
Head _____ Chest _____ Incubator _____
Abdomen ____ Length ____ Temperature _____
Rectal Temperature unable to register on IVAC
Isolette warm gloves & porta warm mattress per Dr. Prinz
Apical Pulse 140 Temperature _____
Respirations 40 - gasping Oxygen Conc. 100 %
Flaring: Mild X Moderate _____ Severe _____
Grunting: Mild _____ Moderate _____ Severe _____
Retracting: Mild _____ Moderate _____ Severe X
Skin:
Color pink mucous memb. Jaundiced _____ Rash _____
Mottled _____ Dry _____

Cry: ~~Lusty~~ crying With Stimulation _____
Without Stimulation X Weak _____
Head:
Caput X Cephalohematoma ? Molding X
Bruised X Monitor Mark _____ Forcep Mark -
Abrasions _____ Petechiae _____ Other _____
Palate: Intact _____ Cleft _____ Lip Cleft _____
Cord:
3 Vessels Visible X
Clamped too closely to count vessels _____ Triple Dye _____
Umbilical Hernia _____ Other _____
Genitalia:
Anus: Patent X Other _____ Vulva: Normal X Other _____
Testicles: Descended Bilaterally _____ Undescended _____
Hydrocele _____ Inguinal Hernia _____ Other _____
Reflexes: Gag ____ Suck ____ Grasp X Moro X Babinski ____

Muscle Tone: Good ___ Fair _X_ Poor ___ Jittery ___ Other ___
AquaNephyton Mg. 1M or PO None Site of Injection _____
Comments: Dr. Prinz here @ 8:40 a.m. -- O_2 per hood started 7090 @ 8:30 a.m. -- DS 45-90 @ 9:10 a.m. -- (illegible comment)

S/ J. Luther
Signature

PROGRESS NOTES

(Labels at top of page "Hartsell Lieza A. Mrs." "9/28/83" "9:49 AM" "Charge Only" "Baby Girl")

9/28/83 8:30/am
Baby admitted to premature nsy in radiant warmer. Baby was 1# 5¾ - she was alert & actively crying c occ. gasping P/40 regular & strong, R 40 c severe retracting & mild flaring. O_2 was started per hood @ 70% (illegible word) Mucous memb pink, fair muscle tone, unable to register temp on IVAC, portawarm mattress placed under baby, gloves c warm water placed around baby. ETCH ICN called.

8:35/am
ETCH ICN transport team here.

8:40/am
Dr. Prinz here. Baby intubated by Dr. Prinz. c 2.5 E.TT & O_2 @ 100% & on ventilator & placed on (illegible word) heart monitor

9:00/am
umb. artery cath. put in by Dr. Prinz
ABG sent to lab

9:10/am
DS 45-90 per ICN nurse

9:30/am
Baby transferred to ETCH ICN in transport isolette c Dr. Prinz & transport team.
S/ J. Luther

ADMISSION

VIA Stretcher DATE 9-28-83 TIME 6:40 AM
NAME Lieza Hartsell M.N. Stigall H.N. Earnest AGE 27
ADDRESS 5043 Montwood Dr.
DISPOSITION OF VALUABLES _____
DOCTOR Manning DR. NOTIFIED Manning
PARA (3 dots over 3 dots) GRAVIDA ~~VI~~
EDC 23 Jan. GESTATION 23½
MEMBRANES: Intact _____ Ruptured A Time 6:55
EXAMINATION _____
T.P.R. 97°-88-22 B.P. 142/70 F.H.T. _____
PREP. _____ ENEMA _____
PCV & HGB _____ RH FACTOR O pos PTT _____
URINE SPECIMEN _____
ANESTHESIA PREFERENCE _____ CONTACT LENS _____
WHEN LAST EATEN _____ HEIGHT 5'4 WEIGHT 173
DENTURES None EXISTING CONDITION OR DISEASE _____
ALLERGIES NKA
ANALGESTA DURING LABOR _____
COMMENTS: This lady's dates are accurate & confirmed by 2 utlrasounds, the most recent one was done yesterday to rule our placenta previa. I think it completely wrong to perform heroic measures as 1° Cesarean to "save" a 23 week fetus or to have neotologist [sic]here for delivery. S/ R.O. Manning

---

DELIVERY

DATE 9-28-83 TIME 7:24 am
INDUCTION definite abruptio placenta
ONSET OF LABOR 3 am COMPLETE DILATION 7:20 am
PRESENTATION ceph LOP POSITION OF DELIVERY ROP
TYPE OF DELIVERY: Spontaneous Yes Forceps No
C. Section No
PLACENTA: Time 7:42 am Method Simple Episiotomy No

Laceration No
ANESTHESIA IV Demeroi OXYTOCIC Pitocin
ESTIMATED BLOOD LOSS 350-400
STAGES OF LABOR: 1st Stage 3 hours 2nd Stage 4 minute
3rd Stage 18 minute
SCRUB NURSE _____
CIRCULATING NURSE S/ F. Goodman S/ L. Hults
COMMENTS: Patient delivered non viable fetus in labor room bed, blood loss seemed around 350-400 cc only

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NEWBORN

SEX Girl NAME Hartsell BRACELET NO. 1011
WEIGHT 1 lbs 5¾ oz LENGTH 12½ inches COLOR B
PEDIATRICIAN _____ RH FACTOR _____
CORD BLOOD TO LAB _____
BREAST ____ BOTTLE ____
GENERAL CONDITION extremely premature - critical
APGAR: 1 Min. 2 5 Min. 1
INJURIES none noted ANOMALIES none noted
RESUSCITATION 7:25 a.m. to 7:30 a.m. - O_2 c entratracheal tube and ambu by M. Tinker & L. Hults
~~CONDITION TO NURSERY~~ _____
SILVER NITRATE 1% EYE GTTS 2 IN EACH EYE _____
CIRCUMCISED IN DELIVERY ROOM _____
COMMENTS: Apgar at 1 min. - Heart rate 50, infrequent gasps, Apgar at 5 min. (1), 40 heart rate - 7:30 a.m. Dr. Manning here and suggested CPR attempts discontinued due to nonviability of fetus, attempt abandoned, 8:20 a.m. spont. resp. to nursery

Fort Sanders Presbyterian Hospital
Knoxville, Tennessee
Obstetrical Record

S/ Richard O. Manning M.D.
Signature

BABY CHART

Fort Sanders Regional Medical Center
ORDERS AND PROGRESS NOTES

Hosp. No. _____
Room _____

Name Lieza Hartsell Doctor _____

_____

_____

Date 9/28/1983
Progress Notes
Anesthesia note regarding resuscitation of newborn baby girl Hartsell:

baby was delivered spontaneously in bed and was immediately taken to delivery room #2 by Linda Hults, R.N. On her way Linda called for me. I was only a few seconds behind her into delivery room. I entered delivery room @ 7:25 A.M., baby was born @ 7:24 AM. The one minute apgar was 2 - 1 for heart rate and 1 for resp. effort. baby intubated c̄ ease c̄ #2.5 O-T tube. B.B.S. audible. heart rate 50. At 7:30 AM, Dr. Manning entered delivery room and was asked by Linda what we should do. Dr. Manning suggested we discontinue CPR due to non-viability of newborn. attempt abandoned (heart rate at time CPR abandoned was 40). I was not informed until about 10 minutes after I had abandoned CPR that Mrs. Hartsell had been given some Demerol IV shortly (before) arrival to labor room. At 8:20 AM, Janie Lanham, R.N., noticed increased respirations and heart rate in newborn and immediately pt. was taken to nursery by Linda Hults, R.N.

Fort Sanders Regional Medical Center
ORDERS AND PROGRESS NOTES

Hosp. No. _____
Room _____

Name Lieza Hartsell Doctor _____

_____

_____

Date 9/28/1983
Progress Notes
Continuation of Anesthesia Note:
The nursery called me about 2 minutes later to reintubate the baby. I tried $\underline{x}$ ___ for about 30 seconds $\overline{s}$ success. While ventilating the baby $\overline{c}$ ambu Dr. Prinz from Children's Hospital arrived and took charge.

FSAG/ S/ M. Tinker CRNA

#102932 RM: ICN
Hartsell, Baby Girl
Dr. Prinz
AGE: 2 hours
ADMITTED: 9/28/83
RESP: Ernest Hartsell

East Tennessee Children's Hospital

Knoxville, Tennessee

History & Physical Examination
cc: Sandra McBee-Birth Certificates
2-West, Ft. Sanders Prsby. Hospital

HISTORY

Baby Girl Hartsell was a .625 kg., approximately 25-26 week gestation black female infant admitted on referral by Dr. Manning from Ft. Sanders Hospital. The infant was born at 7:24 a.m. to a twenty-seven year old Gravida VI, Para III, AB II, married black female who had had no problems during this pregnancy prior to onset of spotting last night. Early this morning the mother developed continuous spotting and premature onset of labor. At this point Dr. Manning ruptured the mother's membranes and allowed her to go ahead and precipitate in bed since two ultrasounds and dates confirmed a 22-23 week gestation. The child precipitated in bed at 7:24 a.m. and had Apgars of 2 and 1. When the infant did not stop gasping at the end of five minutes the nurse anesthetist was called by a labor room nurse who came in and took the infant to the labor room where an endotracheal tube was inserted and resuscitated the infant until Dr. Manning arrived. Dr. Manning arrived at 7:31 a.m. and instructed the resuscitation team to discontinue efforts. At this point the infant had a heart rate in excess of 100 and was slightly dusky. At approximately 8:20 a.m. the infant was still found to have a reasonable heart rate and was gasping some at this point. The labor room nurse took the infant to the nursery where the nursery nurses vigorously resuscitated the infant and called the nurse anesthetist back to intubate. Dr. Manning was consulted by the nursery personnel and requested that the ETCH Transport Team be called. At the time I arrived I found the infant being bagged intermittently and the nurse anesthetist

attempting to reintubate the baby. He was unsuccessful at this point and so I intubated the child with a 2.5 endotracheal tube and we bagged the infant. The infant was pink and active with good tone at this point. I then inserted a UAC and drew an arterial gas. Initial arterial gas revealed pH 7.13, pCO2 31, pO2 52. The negative base excess was -15.9. The infant was given 2.5 mili equ. of Bicarb in 2.5 cc's of water over 5-10 minutes by slow push and then transported back to ETCH on a chemical heating mattress and with warm gloves at the infant's sides in the warmer. The child's temperature on our arrival at Ft. Sanders was less than 94°. By the time we arrived back at ETCH the infant had a temperature of 96.9° rectally, heart rate 165, respirations 23, and an initial BP 22/12. The infant generally appeared to be a 25-26 week gestation black female infant in a moderate amount of respiratory distress.

HEENT: Anterior fontanelle open, soft and pulsatile. Pupils equal, round and reactive to light. Eyes are open. Normal red reflex. Palate intact. Some bruising of the occiput with a small hematoma on the occiput. LUNGS are clear to auscultation. Peripheral pulses all palpated and within normal limits. ABDOMEN: No palpable masses. No increase in liver, kidney or spleen. UMBILICUS has two arteries and one vein. G.U.: Normal female. Rectum patent. Full abduction of the hips. SKIN normal except for bruising of the occiput.

_____ M.D.
Attending Doctor

CH #026

NEUROLOGIC: Good tone, good grasp, absent suck and Moro. Cranial nerves intact.

ADMITTING IMPRESSION:

1) Premature Birth Living Child, AGA, 25-26 Weeks Gestation
2) Respiratory Distress Syndrome, HMD versus TTN
3) Rule Out Sepsis
4) Perinatal Asphyxia
5) Hypothermia

PROBLEM (1): Premature birth living child, AGA - The dates and ultrasounds seemed to indicate that the infant was 22-23 weeks gestation but on examination the infant appears to be 25-26 weeks gestation. There were no maternal problems prior to the premature onset of labor and spotting.

PROBLEM (2): RDS - INITIALLY the child was placed on a rate of 25, PAP 18, PEEP 3 and 100% oxygen after intubation. Currently the child has weaned down to a rate of 19, PAP 14, PEEP 3 and 50% oxygen. Arterial gases have been good and she has not required the use of much buffer. The infant does not really appear to have significant Hyaline membrane disease at this time.

PROBLEM (3): Rule out sepsis - There was no septic risk other than prematurity. Membranes were not ruptured for a prolonged

period. The infant's CBC on admission revealed hematocrit 38, white count 16,000 with 34 polys, 31 bands, 28 lymphs and 2 monos. Platelet count was 152,000. The child was covered with 150 mgs./kg/day of Ampicillin and 5 mgs/kg/day of Gentamicin. Urine Welchogen blood culture and ET culture were obtained.

PROBLEM (4): Perinatal asphyxia - The infant had Apgars of 2 at one minute and 1 at five minutes. This increased rapidly after resuscitation. By ten minutes of age the infant was intubated and being bagged. The infant perked up almost immediately. At 7:31 a.m. Dr. Manning arrived and requested an end to resuscitation efforts. The infant had no active resuscitation and was not bagged or supported until around 8:25 a.m. The child was moved to the nursery at about 8:20 to 8:25 a.m. Immediately after arrival in the nursery resuscitative efforts were vigorous and the nurses called to arrange transport to ETCH. So far the infant has not had any evidence of intraventricular hemorrhage and is alert and active.

PROBLEM (5): Hypothermia - The child's temperature on admission to the ETCH ICN had come up from less than 94 to 96.9°. By the twelve noon temp her temperature was 98.8° rectally. We have warm mist flowing in on the infant currently.

_____ M.D.
Attending Doctor

ETCH #026

ICN
Hartsell, Baby Girl
Dr. Prinz
Admitted: 9/28/83

East Tennessee Children's Hospital

Knoxville, Tennessee

History & Physical Examination

continuation (3)

PROBLEM (6): Fluids, lytes, and nutrition - The infant is currently on 120 cc's/kg/day of D5W. Lytes today revealed sodium 139, potassium 4.3, chloride 108. Blood sugar 99. The infant has voided since admission.

PROBLEM (7): Calcium - She has had calcium gluseptate added to the I.V. fluids in maintenance doses.

PROBLEM (8): Bilirubin - Both mother and child are O+and the direct Coomb's is negative. Admission bilirubin was 1.7 but the child's head is bruised and I am afraid she will become jaundiced from this source.

PROBLEM (9): Hem status - See number three.

S/ Stephen C. Prinz M.D.
Attending Doctor

ETCH #026
SCPjj T: 10/4/83

STEPHEN C. PRINZ, M.D.